No. 79-2049

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In the Supreme Court of the United States

OCTOBER TERM, 1979

STEVEN MANN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the stop and boarding of petitioners' vessel was proper.

2. Whether conduct that occurs outside the United States but which is intended to affect this country may be prosecuted under federal law.

3. Whether petitioners may be convicted and concurrently sentenced on two conspiracies arising out of the same agreement.

4. Whether the court below invoked the concurrent sentence doctrine in affirming petitioners' convictions on one conspiracy count.

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*Co-petitioners are Dennis McLaughlin, Marc Schulman and Bruce Cunningham.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Bifulco v. *United States*, No. 79-5010 (June 16, 1980) 1

Brulay v. *United States*, 383 F. 2d 345, cert. denied, 389 U.S. 986 5

Coats v. *United States*, cert. denied, No. 79-1230 (Apr. 21, 1980) 3

Delaware v. *Prouse*, 440 U.S. 648 4

Erwin v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980) 3

Ford v. *United States*, 273 U.S. 593 6

North Carolina v. *Pearce*, 395 U.S. 711 6

Scott v. *United States*, 436 U.S. 128 4

Terry v. *Ohio*, 392 U.S. 1 4

United States v. *Bowman*, 260 U.S. 94 5

United States v. *Brignoni-Ponce*, 422 U.S. 873 4

United States v. *Brown*, 549 F. 2d 954, cert. denied, 430 U.S. 949 5

Page

Cases—Continued:

United States v. *Cadena*, 585 F. 2d 1252 5

United States v. *Perez-Herrera*, 610 F. 2d 289 5

United States v. *Piner*, 608 F. 2d 358 4

United States v. *Postal*, 589 F. 2d 862, cert. denied, 444 U.S. 832 6

United States v. *Robinson*, 414 U.S. 218 4

Warren v. *United States*, cert. denied, No. 79-6217 (May 19, 1980) 3

Constitution, statutes and regulation:

United States Constitution:

Fourth Amendment 3, 4

Fifth Amendment 6

Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.* 6

21 U.S.C. 846 1

21 U.S.C. 963 1

14 U.S.C. 89(a) 3

18 U.S.C. 924(c)(2) 1

28 C.F.R. 2.20 7

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23-31) is reported at 615 F. 2d 668. The opinion of the district court (Pet. App. 38-47) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1980. A petition for rehearing was denied on May 27, 1980 (Pet. App. 32-33). The petition for a writ of certiorari was filed on June 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of conspiracy to import marijuana into the United States (21 U.S.C. 963), conspiracy to possess marijuana with intent to distribute it (21 U.S.C. 846), and carrying firearms during the commission of a felony (18 U.S.C. 924 (c)(2)). Petitioners Mann and McLaughlin were sentenced to concurrent terms of seven and one-half years' imprisonment on the firearms conviction and five years' imprisonment on the conspiracy offenses, to be followed by a three-year special parole term. Petitioners Cunningham and Schulman were sentenced to concurrent terms of one year's imprisonment, to be followed by a six-year special parole term. The court of appeals affirmed the conspiracy convictions but reversed the firearms convictions and remanded for resentencing (Pet. App. 23-31).[1]

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[1]Petitioners have not challenged their special parole terms. However, in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), this Court held that a special parole term may not be imposed as part of a sentence for narcotics conspiracy. Petitioners may move for correction of their sentences in the district court at the time of their resentencing.

The evidence at trial showed that on March 23, 1978, the Coast Guard Cutter VALIANT was patrolling the Yucatan Strait between the western tip of Cuba and the Yucatan Peninsula of Mexico for general law enforcement purposes, including safety inspections (5 Tr. 13-15). On that day a helicopter assigned to the VALIANT spotted the TEXAS STAR, a shrimp vessel of Texas registry, travelling in the direction of the Texas coast (Pet. App. 24; 5 Tr. 15-19). Petitioner Mann was the master of the TEXAS STAR and the other three petitioners were members of its crew. The TEXAS STAR was not rigged for shrimping, carried no shrimp nets, was not in waters used for shrimping, and was not engaged in fishing (Pet. App. 25). In addition, the vessel was not engaged in marine research and was neither a cargo vessel nor a pleasure boat (*id.* at 43). Accordingly, a decision was made to board the TEXAS STAR. The officer in charge of the boarding party informed petitioner Mann that he was checking for compliance with United States laws; Mann advised him that there were guns aboard (*id.* at 25). The Coast Guard officer then requested the ship's safety regulation papers, which revealed that the Captain of the Port of Galveston had inspected the ship 19 days earlier and had found that the pollution plaque was not in the engine room (*ibid.*).

On the way to the engine room to determine whether the discrepancy had been corrected, the officer smelled marijuana. He asked about burlap-covered bags in the engine room; petitioner Mann replied that the bags contained bauxite (Pet. App. 25, 43). The officer opened some of the bags and discovered marijuana. A full search of the vessel revealed 22,590 pounds of marijuana (*id.* at 25).

Petitioners moved to suppress this evidence on the ground that the Coast Guard lacked authority to board

the vessel. Both the district court and the court of appeals rejected this claim. Both courts found that 14 U.S.C. 89(a) provided the Coast Guard with authority for the stop and boarding, and that, in any event, the Coast Guard had reasonable suspicion that the vessel was carrying contraband (Pet. App. 26-27, 42-45).

ARGUMENT

1. Petitioners contend (Pet. 5-13) that the actions of the Coast Guard officers in stopping and boarding the TEXAS STAR violated the Fourth Amendment because those actions were unsupported by reasonable suspicion that the vessel was being operated in violation of United States laws. Petitioners argue that the Coast Guard sought to circumvent the requirements of the Fourth Amendment by using the pretext of investigating the vessel's identity and registration to disguise their actual motivation, which allegedly was to uncover evidence of a drug smuggling scheme. The court of appeals properly rejected these contentions.

The evidence showed that the purpose of the Coast Guard patrol was to enforce all United States laws, including safety and documentation requirements, not only those laws relating to narcotics smuggling. This Court has recently declined, on several occasions, to review similar claims that the Fourth Amendment was violated by the warrantless and suspicionless boardings of American vessels on the high seas by Coast Guard officers conducting safety and documentation inspections. *Erwin* v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980); *Warren* v. *United States*, cert. denied, No. 79-6217 (May 19, 1980); see also *Coats* v. *United States*, cert. denied, No. 79-1230 (Apr. 21, 1980). There is even less reason to grant review here, since, as both courts below concluded (Pet. App. 26, 42-43), the circumstances provided reasonable suspicion for the boarding of the TEXAS

STAR. Further review of this fact-bound conclusion is unwarranted. The evidence showed that the TEXAS STAR was a shrimping vessel that was clearly not engaged in fishing, was not rigged for shrimping, carried no shrimp nets, and was not in waters used for shrimp fishing (Pet. App. 25, 43). These circumstances, coupled with the fact that the TEXAS STAR was not a cargo vessel (Pet. App. 43), provided ample grounds to suspect that the vessel was engaged in illicit activity. See *Delaware* v. *Prouse,* 440 U.S. 648, 663 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975).[2]

There is no merit to petitioners' contention that the boarding and inspection violated the Fourth Amendment because it was a pretextual search for evidence of crime. In *Scott* v. *United States*, 436 U.S. 128, 137 (1978), this Court concluded that the existence of an alleged Fourth Amendment violation turns on "an objective assessment of [the] officer's actions in light of the facts and circumstances then known to him," without regard to the officer's underlying intent or motivation in taking those actions. See *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Viewed objectively, as we have shown, the actions of the Coast Guard officers in this case were reasonable under the Fourth Amendment.

2. Petitioners next argue (Pet. 13-15) that the federal courts are without jurisdiction over their conduct because

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[2]Accordingly, contrary to petitioners' contention (Pet. 6), this case does not conflict with *United States* v. *Piner*, 608 F. 2d 358 (9th Cir. 1979). That case involved a nighttime boarding where there was no founded suspicion of illegal activity. *Id.* at 359, 361. The court held that "[a] stop and boarding after dark must be for cause, requiring at least a reasonable and articulable suspicion of noncompliance * * *" (*id.* at 361). Here, in contrast to *Piner*, the daytime stop and boarding were based on "a reasonable and articulable suspicion" of illegal activity.

it occurred outside the territory of the United States. This claim was correctly rejected by the court of appeals and does not merit further review.

As the court of appeals observed (Pet. App. 28, quoting from *United States* v. *Cadena*, 585 F. 2d 1252, 1257 (5th Cir. 1978)), "[t]he nation has long asserted the objective view, under which its jurisdiction extends to persons whose acts have an effect within the sovereign territory even though the acts themselves occur outside it." See *United States* v. *Bowman*, 260 U.S. 94, 98 (1922). Given the location and course of the TEXAS STAR when it was stopped and the large amount of contraband the vessel was carrying, the jury could reasonably have inferred that petitioners intended that the marijuana would be imported and distributed within the United States, thus satisfying the requirement that the acts have an effect on this country. See, *e.g.*, *United States* v. *Perez-Herrera*, 610 F. 2d 289, 292 (5th Cir. 1980); *United States* v. *Brown*, 549 F. 2d 954 (4th Cir.), cert. denied, 430 U.S. 949 (1977); *Brulay* v. *United States*, 383 F. 2d 345, 349-350 (9th Cir.), cert. denied, 389 U.S. 986 (1967). A contrary rule, requiring the completion of some act within the United States, would, as the court below noted (Pet. App. 28), make the enforcement of the drug laws more difficult and would also frustrate congressional intent to eliminate the influx of illicit drugs. See *United States* v. *Perez-Herrera*, *supra*, 610 F. 2d at 292.

Moreover, the evidence at trial showed that petitioners embarked from Galveston, Texas, to pick up marijuana in Colombia for importation into the United States (5 Tr. 67-68, 94-96), and that while in Galveston petitioners Mann and McLaughlin attempted to recruit additional participants into the smuggling scheme. In view of the fact that these and other overt acts in furtherance of the conspiracy were committed by petitioners in this country,

the federal courts properly exercised jurisdiction over petitioners' criminal conduct. See *Ford* v. *United States*, 273 U.S. 593, 619-624 (1927); *United States* v. *Postal*, 589 F. 2d 862, 886 n.39 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979).

3. Petitioners also contend (Pet. 15-17) that their convictions and concurrent sentences for two conspiracies arising out of the same agreement violated their rights under the Double Jeopardy Clause. But the Fifth Amendment prohibition "against multiple punishments for the same offense" (*North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969)) does not bar the imposition of concurrent sentences, at least where, as here, such sentences will have no practical adverse consequences for the defendants (see page 7, *infra*). In any event, even assuming that petitioners' concurrent sentences can be viewed as "multiple" for double jeopardy purposes, we recently addressed the multiple punishment question in our brief in opposition in *Albernaz* v. *United States*, No. 79-1709, a case in which the defendants received consecutive sentences for narcotics conspiracies that stemmed from a single agreement. For the reasons stated in our brief in *Albernaz*, we submit that the Double Jeopardy Clause does not prevent multiple convictions and multiple punishments when Congress has so provided, as it did here in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*[3]

4. Finally, petitioners claim (Pet. 17-21) that the court of appeals improperly invoked the concurrent sentence doctrine in affirming their convictions for conspiring to possess marijuana with the intent to distribute it. This claim lacks merit because the concurrent sentence

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[3]We have provided a copy of our brief in opposition in *Albernaz* to counsel for petitioners.

doctrine was merely one reason invoked by the court for rejecting the petition for rehearing (Pet. App. 32-33). The court below affirmed petitioners' convictions for conspiracy to distribute on the ground that their intent to distribute could be inferred from the large amount of marijuana involved (*id.* at 27).

In any event, petitioners fail to specify how they will be subjected to adverse collateral consequences from their convictions on the second conspiracy count. Indeed, there is no indication that they will suffer any such consequences, for under the Parole Commission's sentencing guidelines, 28 C.F.R. 2.20, their conduct in conspiring to import such a large amount of marijuana already places their offense in the "Very high" or "Greatest I" offense severity category, and conviction on a second count, for which they have received concurrent sentences, will not increase the prison terms they must serve. Accordingly, no reversible error occurred in the reliance, if any, by the court of appeals on the concurrent sentence doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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